SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 237

ROSS ENGINEERING COMPANY, INCORPORATED,
A CORPORATION,
Petitioner,

vs.

THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS AND BRIEF IN SUPPORT THEREOF.

BERNARD J. GALLAGHER,
Counsel for Petitioner.

M. WALTON HENDRY,
Of Counsel.

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ROSS ENGINEERING COMPANY, INCORPORATED,
A CORPORATION,
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THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

Bernard J. Gallagher, on behalf of the petitioner, prays that a writ of certiorari be issued to review the judgment of the Court of Claims of the United States entered in the above-entitled case on February 5, 1945.

Opinions Below

The opinions of the Court of Claims (R. 19) are not yet officially reported.

Jurisdiction

Judgment in the Court of Claims was entered February 5, 1945 (R. 33), and petitioner's motion for new trial was overruled May 7, 1945 (R. 33). The jurisdiction of this Court is invoked under Section 3(b) of the Act of February 13, 1925, as amended.

Questions Presented

(1) Whether the respondent, having bound itself by an unqualified contract to erect and furnish to the petitioner, by certain dates, foundations upon which petitioner was required to erect the superstructures, was guilty of a breach of contract by not completing the foundations by the agreed dates.

(2) Whether the respondent is liable in damages to petitioner for its failure to complete the foundations by the dates specified.

Contract Provisions Involved

The contract provisions involved are set forth in the appendix, infra, p. 20.

Statement

The petitioner, Ross Engineering Company, Inc., entered into a contract with the United States on September 3, 1938 to construct a 250-man barracks for the Government at Fort Niagara, New York. It sued the Government in the Court of Claims for damages for breach of contract, the breach being the failure of the Government to complete and turn over to the petitioner on the dates specified in the contract the foundations upon which the petitioner was to build the superstructure on the barracks. The petitioner claimed that because of this delay on the part of the Government, petitioner was forced to carry on during the winter months work which it could have but for the delay completed before winter, and that the winter work required the use of more materials and the expenditure of more money for labor than it would have required if the work had been done before winter.

The Government, on August 15, 1938, issued its invitations for bids on this job. The invitation included the speci-

fications for the proposed superstructures and in Addendum No. 1 to the specifications, which addendum is quoted by the Court below in finding 2 (R. 20), it is stated that the Government would complete the foundations and clear the site of the north wing by September 5, of the connecting bay by September 20, and of the south wing by September 30 (R. 20). The Court below further found it to be a fact as shown in findings 10 and 12, R. 24 and 25, that the three foundations were not completed and the sites cleared until 15, 27, and 40 days, respectively, after the dates stated in the invitation to bids and in addendum No. 1 (R. 30).

The Court below further found it to be a fact, finding 4, R. 21 and R. 29 and 30, that in working up the figures for the petitioner's bid on the job, petitioner proceeded on the theory that the statements of the Government with respect to the dates for the completion of the foundations would be fulfilled and that before the setting in of cold and bad weather which the contractor knew from past experience in that territory would be about the middle of December, the petitioner could complete all the concrete work of the entire frame and floor slabs, and by running up the brick walls could enclose the north half of the building and thus be able to do a large amount of the inside work during the winter months. The Court below further found it to be a fact that such a theory was practical and could have been accomplished by petitioner if the respondent had completed the foundations on the dates stated in addendum No. 1 (R. 21 and 29). The Court below found that the delay of the respondent in completing the foundations prevented petitioner from finishing the concrete work before cold weather set in about December 15, 1938, and that the additional cost and expense that resulted from the doing of the concrete work during the winter weather between December 15, 1938 and March 31, 1939 over what it would

have cost had that work been done prior to winter weather, were as follows:

Tarpaulins $244.25, and salamanders $494.61, for protection of concrete from frost	$738.86
Heating concrete	124.68
Extra cement in concrete	439.56
Removal of snow	251.78
Labor on winter protection	1,188.76
Additional cost of labor for concrete and form work during cold weather	7,739.46
Overhead for 35 days' delay	111.26
Total	$10,594.36

(R. 28.)

The Court below, however, denied petitioner's right to recover for these damages on the ground that after the bids were opened, the petitioner learned from one of its employees that the completion of the foundations would probably be delayed beyond the dates specified because the respondent's workmen had run into an underground spring in building the foundations and the supervisors could not work the WPA labor more than a limited number of hours per week, as a result of which the foundations would probably not be ready to receive the superstructures for from two to four months. There was no finding made by the Court below that the respondent at any time informed petitioner or any of its agents or employees that the foundations would not be completed by the dates specified in Addendum No. 1 of the specifications.

Specifications of Errors to Be Urged

The Court of Claims erred:

(1) In not holding that the respondent was bound as a matter of contract to complete the foundations by the dates stated in Addendum No. 1 to the specifications.

(2) In holding as a matter of law that any information, expectation or belief that the petitioner had at the time of entering into the contract that the foundations might not be completed on the dates named in the contract, relieved the respondent of its contract obligations to complete the foundations by the dates named in the contract.

(3) In holding that the question of misrepresentation or warranty is relevant to the issue.

(4) In holding that because neither party had any expectation that the foundations would be ready on the dates named in the contract at the time petitioner's bid was made and accepted, "the dates set in the specifications for the completion of the foundations passed completely outside the contemplation of the contract."

(5) In not holding that petitioner was entitled to damages incurred by reason of the failure of the respondent to complete the foundations on the dates specified in Addendum No. 1 to the specifications.

(6) In failing to render judgment in favor of petitioner in the sum of $10,594.36.

(7) In dismissing the petition and entering judgment for respondents.

(8) In overruling petitioner's motion for new trial.

Reasons for Granting the Writ

It is a matter of common knowledge that the Government annually enters into a vast number of contracts which contain similar provisions to the contracts in suit, which obligate the Government to perform certain acts as part of the consideration for the contract. The decision of the Court of Claims in the instant case is contrary to the many decisions of that Court as well as to the decisions of this

Court in not recognizing the well-known rule of law that when the Government enters into a contract with individuals, it is bound by the same rules and regulations as govern contracts between private parties. *Perry* v. *U. S.*, 294 U. S. 330; *State Bank* v. *U. S.*, 96 U. S. 30; *Gilbert, et al.* v. *U. S.*, 1 C. Cls. 28 (affirmed 8 Wall., 358); *Lyons* v. *U. S.*, 30 C. Cls. 352; *Southern Pa. R. R.* v. *U. S.*, 28 C. Cls. 77. If the Government is allowed to escape liability for damages suffered for its failure to perform its contract, and for its breach of contract, on the ground that the contractor had some information which might lead him to believe that the Government would not perform the obligations stated in the contract, then no Government contract would be worth the paper it is written on. It is also common knowledge that Government contracts are drawn by the Government and that contractors merely execute the same, so that if the terms of the written contract are not satisfactory to the Government, it is plainly the fault of the Government and not the contractor, and the remedy in such a case is to draw the contract in such terms as is satisfactory to the Government. (*American Surety Company* v. *The United States.*) (322 U. S. 96).

The question involved in this case, therefore, is of tantamount importantce, since the decision of the Court below in the instant case appears to be a total reversal of the many decisions of this Court on the question as to whether or not the Government, when entering into an unqualified undertaking, is bound by the same law as governs Government contracts between individuals.

The Law

Error of Law Number (1)

Petitioner submits that the Court below erred in not holding that the respondent was bound as a matter of contract

to complete the foundations by the date stated in addendum No. (1) to the specifications. It will be noted that sub-paragraph (a) of addendum Number (1) states that:

"the foundation of the north wing * * * will be completed and site cleared so that the successful bidder can start work Sept. 5, 1938, without interference"; that sub-paragraph (b) of addendum No. (1) states "the foundation of the connecting bay * * * will be completed and cleared on or before Sept. 20, 1938"; that sub-paragraph (c) of addendum No. (1) states "the foundation of the south wing will be completed and cleared on or before Sept. 30, 1938." (R. 20)

There is no question whatsoever but that the above-mentioned addendum No. (1) of the specifications is a part of the contract. The respondent's undertaking to complete the foundations by the dates named is unqualified by any contingency whatever. The law is that when any party to a contract enters into "an unqualified undertaking," as the Government did in this case, he must perform or pay damages to the other party. There is no exception whatever to this well-known rule of law. In the case of *Chicago, M. & St. P. R. Co.* v. *Hoyt,* 149 U. S. 1, 14, Justice Jackson of the Supreme Court said:

> "There can be no question that a party may, by an absolute contract, bind himself or itself to perform things which subsequently become impossible, or pay damages for the nonperformance, and such construction is to be put upon an unqualified undertaking, where the event which causes the impossibility might have been anticipated and guarded against in the contract, or where the impossibility arises from the act or default of the promissor."

In the case of *Dermott* v. *Jones*, 69 U. S. 1, 7, the Supreme Court, speaking through Justice Swayne, said:

> "In that instrument the defendant in error (the promissor) made a covenant. That covenant it was his duty to fulfill, and he was bound to do whatever was necessary to its performance. Against the hardship of the case he might have guarded by a provision in the contract. Not having done so, it is not in the power of this court to relieve him."

Elliott, on contracts, laid down the rule as follows:

> "Sec. 1892. *Impossibility by an act of God.*—* * * The general rule is that, where an obligation or a duty is imposed upon a person by law, he will be absolved from liability for nonperformance of the obligation if such nonperformance was occasioned by an act of God; but when one undertakes by an express contract to do a given act, *he is not* absolved from liability for nonperformance, even though he is prevented from doing the same *by an act of God*. In the latter class of cases, if a person desires to absolve himself from liability for nonperformance under any circumstances he should so stipulate in his contract." *3 Elliott on Contracts, sec. 1892.*

The respondent, in the instant case, made an unqualified undertaking that the foundations in question would be completed by the date stated. The Government itself drew this contract and it could have provided therein for the events which prevented it from performing its contract by the dates named, but it did not do so. The respondent knew they were going to use W. P. A. labor, and they knew of the spring. If delay in completing foundations was to be excused because of these things, it would have been a simple matter for the Government to insert such a reservation in addendum No. (1), but it failed to do so. It failed utterly to make any provision whatsoever for any contingency that might

arise, but by "an unqualified undertaking," contracted to complete the foundations by the dates stated. Therefore, in accordance with the decision of the Supreme Court, the respondent was bound to either complete the foundations by the dates stated, or to pay the damages for failure to do so.

It will be noted that the case of *Dermott* v. *Jones*, above referred to, is identical. In that case, the Supreme Court stated again "against the hardship of the case, he might have guarded by a provision in the contract. Not having done so, it is not in the power of this Court to relieve him." Nor can the Court below in this case relieve the respondent for its failure to complete the foundations by the dates specifically and unqualifiedly stated in the contract, or relieve respondent from paying the damages suffered by the petitioner.

It will be further noted that Elliott, a well-known authority on contract law, states that even an Act of God would not relieve a party from performing an unqualified contract obligation unless the contract in such a case so stipulates.

Error of Law Number (2)

Petitioner further submits that the Court below erred in holding as a matter of law that any information, expectation, or belief, that the petitioner had, either prior to submitting its bid or thereafter, that the foundations would not be completed on the dates named in the contract, would relieve the respondent of its contract obligation to complete the foundations by the dates it was required by the contract to complete them.

It will be noted from the excerpt from the decisions of the Supreme Court and authorities, supra, that there is no exception to the rule that a party must either perform an unqualified undertaking or else pay the damages, unless

the contract provides against the event which prevented performance. The Supreme Court does not state that this rule is contingent upon the other party having information, expectation, or belief that the party bound would not perform its unqualified contract obligation. Manifestly, the reason for this is that the offended party, in this case the petitioner, could not possibly know as a *fact* that the foundations would not be completed by the respondent within the time stated in the contract. He could only believe or infer from the condition in which Kurtz saw the foundations that they might not be completed within the time required. He could not know as a fact that the foundations would not be ready on the agreed dates *until the time had expired*, unless the respondent had so informed him in advance. No such information was ever given by respondent to petitioner. On the contrary, the contract in unqualified terms notified the petitioner that the foundations would be completed by the dates named. The law provides, as hereinbefore shown, that a party making an "unqualified undertaking," in the absence of some saving clause in the contract, must either perform by the dates named, or pay the damages. It is elementary that the respondent, as well as the petitioner, is charged with knowledge of the obligation imposed on it by law.

Petitioner knew that it was possible for respondent to complete the foundations by the dates named if they put on a sufficient number of men and machines. It is a matter of common knowledge that contractors build great camps, ships, airfields, and other enormous construction projects in very short periods of time. The construction of these foundations was a comparatively small job, which the respondent could easily have performed by the agreed dates if they had the will to do it. The respondent never has contended in this case that it was impossible for them to carry out their undertaking.

In the case of *George W. Jones* v. *United States,* 96 U. S. 24, Justice Clifford, speaking for the Court, stated:

> "Impossible conditions cannot be performed; and if a person contracts to do what at the time is absolutely impossible, the contract will not bind him, because no man can be obliged to perform an impossibility; but where the contract is to do a thing which is possible in itself, the performance is not excused by the occurrence of an inevitable accident or other contingency, although it was not foreseen by the party, nor was within his control."

In the case of *The Harriman* v. *Emerick,* 76 U. S. 161, 172, the Supreme Court, speaking through Justice Clifford, stated:

> "If a lessee covenant to repair, and the house is burned down, he is bound to rebuild. If a party covenant to build a bridge and keep it in repair for a specified time, and it be swept away by an extraordinary flood before the time expires, he must replace it. A party agreed to secure in England for another the exclusive right to make, use and vend in the Canadas a machine covered by a patent from the United States. It was found that this could only be done by an Act of the British Parliament. As such a grant, however improbable, was not impossible, it was held that the case was within the rule laid down in *Paradine* v. *Jane,* and that the covenantor was liable for the breach of his agreement. *Beebe* v. *Johnson, 19 Wend., 500.* If a condition be to do a thing which is impossible, as to go from London to Rome in three hours, it is void; but if it be to do a thing which is only improbable or absurd, or that a thing shall happen which is beyond the reach of human power, as that it will rain tomorrow, the contract will be upheld and enforced. Comyn, Digest, 96; Rolle, 420, 1.20."

In the case of *Carnegie Steel Co.* v. *United States,* 240 U. S. 156, the Supreme Court, speaking through Justice McKenna, stated, page 165:

> "But even if this cannot be asserted, the case falls within *The Harriman, supra,* where it is said that the principle deducible from the authorities is that if what is agreed to be done is possible and lawful, it must be done. Difficulty or improbability of accomplishing the undertaking will not avail the defendant. It must be shown that the thing cannot by any means be affected. Nothing short of this will excuse nonperformance."
> "And it was held in Sun Printing & Pub. Assoc. v. Moore, 183 U. S. 642, 46 L. ed. 366, 22 Sup. Ct. Rep. 240, that 'It was a well-settled rule of law that if a party by his contract charged himself with an obligation possible to be performed, he must make it good, unless its performance is rendered impossible by the act of God, the law, or the other party. Unforeseen difficulties, however great, will not excuse him.' Cases 60 L. ed."

Therefore, even if petitioner had reasons to expect that the foundations would not be completed by the date stated, it did not know that this assumption was correct. However, it did know it was possible for respondent to complete the foundations by the dates stated. The law gives the petitioner the right to rely upon the unqualified undertaking of the respondent that the foundations would be completed on the dates stated.

The Court, below, therefore, is in error in holding that the respondent was relieved of its unqualified obligation. The Supreme Court has so held in the cases cited, saying that the only relief available to the respondent in such a case is a saving provision in the contract.

Error of Law Number (3)

Petitioner submits that the Court below erred in holding that the question of misrepresentation or warranty is relevant to the issue. The question involved here is neither one of misrepresentation nor one of warranty. It is a question purely and simply of a contract obligation to complete

these foundations by the dates specified in the contract. Petitioner does not even allege it was misled or that there was any misrepresentation, nor does it claim that there was any warranty. What the petitioner does claim is that the respondent entered into an unqualified contract obligation which the Supreme Court stated bound the respondent either to perform, or pay the damages.

ERROR OF LAW NUMBER (4)

The Court below erred as a matter of law in holding (R. 32-33), that because neither party had any expectation that the foundations would be ready on the dates named in the contract at the time petitioner's modified bid was made and accepted, "the dates set in the specifications for the completion of the foundations passed completely outside the contemplation of the contract." The modified bid referred to by the Court below, was the offer of the petitioner to reduce his original bid time for completing the work from 550 days to 300 days. (Rec. 22, finding 6.)

Neither the modified offer nor the acceptance thereof eliminated the dates set in the specifications for the completion of the foundations. The modified offer and acceptance was made prior to the execution of the formal contract. When the formal contract was executed, it included the unqualified undertaking of the respondent to complete the foundations by the dates stated in addendum Number (1).

The court below states that at the time this modified offer was made and accepted, neither party expected that the respondent would complete the foundations by the dates named in the contract. As far as respondent is concerned, this statement is obviously incorrect because the respondent said in so many words in their formal signed contract that they would have the foundations ready by the agreed

dates. There is no finding by the Court in this case that the Government ever informed the petitioner that it did not expect to, or would not, complete the foundations by the dates named. On the contrary, the respondent specifically stipulated that it would complete them by the dates named.

If, as the Court below states, the respondent had no expectation of completing the foundations by the dates named in addendum No. (1), was it not the clear duty of the respondent at the time the modified offer was accepted, or certainly at the time of signing the formal contract, to so inform the petitioner instead of notifying the petitioner in plain words by addendum No. (1) that it would complete the foundations by the dates stated? Did the respondent have no obligations whatsoever to inform petitioner that it never expected to carry out the terms of the contract which it signed? The respondent is clearly chargeable with knowledge of the law and the law is, as we have herein shown, that a party to a contract entering into an "unqualified undertaking" is bound either to perform in accordance with its undertaking, or pay the damages.

The Court below has relieved the respondent of its obligations under this contract on the ground that the petitioner did not expect the foundations to be completed by the dates named, and at the time of making its modified bid, did not protest to respondent that the foundations were not further along at that time. In doing this, the Court below totally disregarded the contract obligation of the respondent to complete the foundations by the dates named, or pay the damages, and that this obligation was possible of performance. Furthermore, the Court below ignores the important fact that the petitioner could not be charged with knowledge that the foundations would not be completed by the dates named, but could only infer from the conditions of the foundations that they might not be completed by the

dates named, whereas the respondent must have known what it intended to do and what it could do.

Since petitioner had a perfect legal right, as we have herein shown, to rely upon the respondent's unqualified undertaking to complete the foundations by the dates stated, it was entirely unnecessary for petitioner to protest that the foundations had not progressed further at the time of submitting its modified bid, or entering into the contract. However, if there was an obligation on the part of the petitioner to protest at the time of making its modified offer, there was certainly a greater legal obligation on the part of the respondent to notify the petitioner that it did not expect or intend to perform the contract which it was entering into, particularly since respondent had knowledge of essential facts not known to petitioner. If the respondent had done this instead of entering into a contract, whereby it agreed without any qualification whatsoever that it would complete the foundations by the dates stated, this case would not be in Court, as unquestionably, in such a case, the petitioner would have refused to sign the contract and could properly have refused to do so, since bids were submitted upon the representation by the respondent in the specifications that the foundations would be completed by the dates stated.

Since the respondent did not inform the petitioner that it did not intend to carry out its contract obligation, but on the contrary, entered into a contract by which it undertook to perform by the dates stated, it is clear that the Court below is in error in concluding that the respondent did not expect to complete the foundations by the dates named. Otherwise, the respondent would certainly have so informed the petitioner, and would not have entered into such a contract. Therefore, we submit that the Court below is clearly in error in stating that both parties never expected the foundations to be completed by the dates named, since the

facts per se show that the respondent never had any such expectation, and the fact that the petitioner may have inferred that the foundations would not be completed by the dates named from what it saw of their condition, plainly under the law, as stated by the Supreme Court in the cases cited herein, does not relieve the respondent of its unqualified contract undertaking, either to perform or pay the damages.

In order to reach the conclusion which the Court below has done in the instant case, it is necessary to totally disregard this stipulation in the contract. We submit that the Court below has no power to do this. In the case of *Calderon* v. *Atlas Steamship Co.*, 170 U. S. 272, 280, the Supreme Court stated:

> "Parties are presumed to know the force and effect of the language in which they have chosen to embody their contracts, and to refuse to give effect to such language might result in artfully misleading others who had relied upon the words being used in their ordinary sense. In construing contracts words are to receive their plain and literal meaning, *even though the intention of the party drawing the contract may have been different from that expressed.* A party to a contract is responsible for ambiguity in his own expressions, and has no right to induce another to contract with him on the supposition that his words mean one thing while he hopes the Court will adopt a construction by which they would mean another thing more to his advantage. Clark, Contracts, p. 593."

The construction given to this contract by the Court totally disregards the contract provision, which required the defendant to complete the foundations by the dates named, since the Court states that this provision of the contract "passed completely outside the contemplation of the contract" because when the parties signed the contract they didn't expect to carry out this provision. In other

words, the Court in giving a construction to this contract concludes that the intent of the parties was contrary to and in total disregard of the plain and unambiguous language of the contract. This the Court below has no power to do, for, by so doing, it would be making a contract for the parties in violation of the well-known rule laid down by the Supreme Court in *Calderon* v. *Atlas, supra.*

It is plain, therefore, that if the parties did not intend or expect to complete the foundations by the dates named in the specifications, then the only remedy was to eliminate that provision from the contract before it was executed. If the party to be charged can escape liability under a contract because that party did not expect to perform the contract at the time it was executed, no contract would be worth the paper it is written on.

In the recent decision of the Supreme Court in the case of *American Surety Co.* v. *United States, supra,* the Court said:

> "* * * but we are confronted here with an unambiguous contract * * * Since we are not justified in rewriting the clear provisions of the contract to include what might well have been but was not inserted, the judgment below must be affirmed."

This decision of the Supreme Court was followed by this Court below in the *National Surety Corporation* case, No. 45797, decided December 4, 1944. This case is in conformity with all the Supreme Court cases and authorities cited herein.

It is a curious conclusion that the Court below has reached in deciding that the respondent is not bound by the facts of which it had knowledge, while the petitioner is bound. It is even more curious that the Court below relieved the respondent of its unqualified obligation to build the foundations by certain specified dates, which unqualified obliga-

tion the respondent itself deliberately entered into after it had full knowledge of all the facts. No one knew better than the respondent itself what its plans were with respect to building the foundations, or what difficulties they might encounter by the use of W. P. A. labor. It is a strange proposition of law that the Court below should hold that either party is not bound by the contract they make when they enter into it with full knowledge of the facts. It is a one-sided doctrine that holds the petitioner and not the respondent.

If the party to be bound, in this case the respondent, can be released from his unqualified undertakings in a contract, which he entered into with full knowledge of the facts, then there would be no point in making a written contract.

In all the decisions of the Supreme Court herein cited, they hold that the party to be bound cannot be released from an unqualified undertaking in a contract, except by a specific reservation in the contract itself, and there was no such reservation in this contract. Therefore, the Court's decision in this case is in direct conflict with all the Supreme Court cases cited herein.

ERROR OF LAW NUMBER (5)

The Court below erred in not holding that the respondent was bound as a matter of contract to complete the foundations by the dates stated in Addendum No. 1 to the specifications.

ERROR OF LAW NUMBER (6)

The Court below erred in not holding that petitioner was entitled to damages incurred by reason of the failure of the respondent to complete the foundations on the dates specified in Addendum Number (1) to the specifications.

ERROR OF LAW NUMBER (7)

The Court below erred in failing to render judgment in favor of petitioner in the sum of $10,594.56.

ERROR OF LAW NUMBER (8)

The Court below erred in dismissing the petition and entering judgment for respondents.

ERROR OF LAW NUMBER (9)

The Court below erred in overruling petitioner's motion for a new trial.

Respectfully submitted,

BERNARD J. GALLAGHER.

M. WALTON HENDRY,
Of Counsel.

APPENDIX

Contract Provisions

Addendum No. 1 to the Specifications, provided in part as follows:

"The work of excavating foundation and constructing footings for all columns and interior brick walls, and constructing exterior walls, area walls, and area stairs as indicated on Plan No. 6491-140 (See General Note), No. 6491-141, 6491-142, and 6491-143, where applicable to the above listed work will be completed by the Constructing Quartermaster, Fort Niagara, N. Y., insofar as called for on the plans as follows:

(a) The foundation of the North wing to "CJ" between footings, numbered 25 and 30 and 27 and 28, Foundation Plan and Detail (Plan No. 6491-140) of barracks for 250 men will be completed and site cleared so that the successful bidder can start work September 5, 1938, without interference.

(b) The foundation of the connecting bay (main building) from "CJ" between footings numbered 25 and 30 and 27 and 28 to "CJ" between footings numbered 49 and 54 and 51 and 52 will be completed and cleared on or before September 20, 1938.

(c) The foundation of the south wing will be completed and cleared on or before September 30, 1938."

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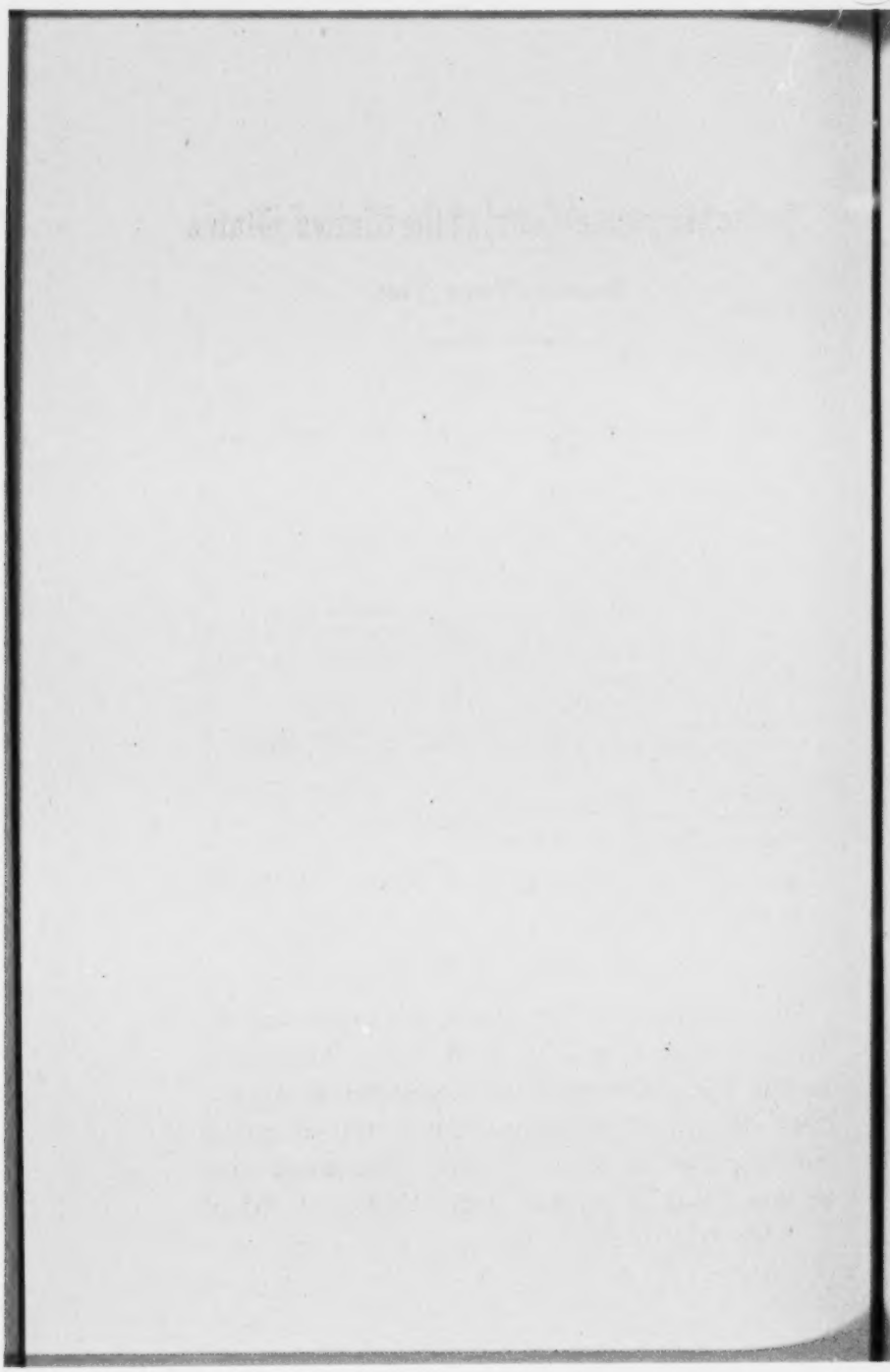
CITATIONS

664287—45



In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 237

ROSS ENGINEERING COMPANY, INCORPORATED,
PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 29–33) is not yet reported.

JURISDICTION

The judgment of the Court of Claims was entered on February 5, 1945 (R. 33). Petitioner's motion for a new trial was overruled on May 7, 1945 (R. 33). The petition for a writ of certiorari was filed on July 17, 1945. The jurisdiction of this Court is invoked under Section 3 (b) of

the Act of February 13, 1925, as amended by the Act of May 22, 1939.

QUESTION PRESENTED

Whether, by virtue of a contract provision whereby the United States undertook to deliver completed foundation structures by specified dates, a contractor can recover from the United States its increased cost of performing concrete work in winter when, at the time of entering the construction contract, both the contractor and the Government knew, and acted on the basis of that knowledge, that such foundation work would not be completed until dates later than those specified, thus necessitating winter concrete work.

STATEMENT

On August 15, 1938, the United States issued an invitation for bids in connection with the proposed construction of a barracks at Fort Niagara, New York (R. 20). Since the Government proposed to clear the site and construct foundations itself by utilizing W. P. A. labor, the invitation for bids on the construction of the building specified, *inter alia,* that the foundations of the three wings of the building would be completed on September 5, September 20, and September 30, 1938, respectively (R. 20).

Petitioner, a building contractor with its principal office in Washington, D. C. (R. 19–20), prepared a bid in connection with the invitation of August 15, 1938 (R. 21). Initially, petitioner

contemplated a continuous operation in the pouring of concrete by scheduling operations on the various building wings as each foundation was completed, thus avoiding winter work (R. 21). However, petitioner did not insert a figure into its prepared bid but sent its engineer to Fort Niagara (the designated place for the submission and opening of bids) for the purpose of there filling in the amount (R. 21).[1] This engineer, who was also sent to examine the site, learned that the foundations could not be completed by the dates specified in the invitation (R. 21–22). The engineer, on August 30, 1938, telephoned petitioner and informed it that the foundations would not be ready for two, three or four months thereafter (R. 22). The money figure to insert in the bid was thereupon furnished by petitioner to the engineer who completed and submitted the bid (R. 21–22).

Petitioner's bid was the lowest by a small amount but its provisions as to time for completion of the project and time within which to commence work were not the most favorable to the Government, nor was the time within which the bid was to remain open for acceptance as long as that set in another bid (R. 22). The engineer

[1] Petitioner's implication (Pet. 3) that the hope of avoiding winter work was the basis used in calculating the money figure inserted in its bid is unsupported by the court's findings (R. 21–22).

again telephoned the petitioner and informed it of these facts (R. 22).[2] On September 1, 1938, prior to the acceptance of its bid, petitioner reduced the time set in its bid for performance from 550 days to 300 days (R. 22–23). Petitioner's modified bid was accepted on September 3, 1938, and a formal contract was executed as of that date (R. 23). The formal contract embodied by reference portions of the invitation, including that portion which established September dates for the completion of the various foundations (R. 5).

Acting on its knowledge that the foundations would not be ready on the dates specified in the written contract, petitioner did not enter the subcontract for concrete work until September 18, 1938 (R. 24). Utilizing the same knowledge in negotiating this subcontract, petitioner was able to obtain a substantial reduction in the subcontractor's asking price because of economies the subcontractor could thus effect in the use of form lumber (R. 24).

The north wing foundation was completed on September 20, 1938, the bay foundation on October 15, 1938, and the south wing foundation on November 4, 1938 (R. 24, 25), these completion dates being earlier than those anticipated by petitioner at the time of submission of its bid (R.

[2] Either in this telephone conversation or in the earlier one, the engineer informed his Washington office that the foundation work was being retarded by reason of the discovery of an underground spring and the limited hours of work allowed in the use of W. P. A. labor (R. 22).

22). The subcontractor proceeded with the concrete work as each of the wing foundations was completed (R. 24–25), with certain minor delays caused by himself, until, after a dispute with petitioner, he abandoned the work on December 15, 1938 (R. 24, 25–26). On that date, the first floor and a small portion of the second floor concrete work had been completed (R. 26). Petitioner completed the concrete work itself (R. 26). On and after December 16, 1938, cold weather required petitioner to enrich the concrete mixture, to purchase tarpaulins to cover the concrete, and to use heat devices to prevent freezing; icy roads also caused some loss of time in the work, which was, however, completed within the contract period as extended by the United States (R. 26). The extension was based on a request therefor made by petitioner on December 16, 1938, in which attention was called to the completion of the foundations at times later than those specified in the original invitation (R. 26–27) [3] and to the decrease from 550 to 300 days in the time specified for completion of the work (R. 27). A thirty-

[3] As noted by the court below, the letter in which petitioner requested this extension contained the "untrue statement" that petitioner had discovered that the foundations were not ready "upon receiving notice to proceed" (R. 32). The court found, as set forth above, that petitioner, prior to the submission of its bid, knew that the foundations would not be completed by the September dates specified in the "invitation" In fact, the foundations were completed sooner than anticipated by petitioner.

five day extension was requested by and granted to petitioner as a "suitable adjustment" (R. 27–28).[4]

A final invoice was submitted by petitioner on or about September 1, 1939, and, by check dated September 16, 1939, petitioner was paid the contract price plus certain extras (R. 26).

The petitioner thereafter brought suit, alleging that the completion of the foundation work by the United States at dates later than those specified in the written contract constituted a breach of contract which entitled it to recover the increased cost of performing winter concrete work. The court below found the facts as set forth above and stated that, since petitioner had knowledge of the actual progress of the foundation work prior to the time of submission of its bid and had "made all * * * arrangements accordingly" (R. 30), petitioner could not have been misled to its damage (R. 31). The court further stated that there was no justification for ignoring petitioner's knowledge of these facts in order to hold that the United States had warranted the completion of the foundation work on the dates originally specified (R. 31). The

[4] The contract (No. W 6491 qm–4, O. I. No. 2) contained the usual provision for liquidated damages, the rate being $50 per calendar day of delay in completion of the work (R. 10, 24).

court noted that petitioner's position as low bidder depended on so slight a margin as to be jeopardized by any change petitioner might have made in its bid (R. 32). It held that the foundation completion dates contained in the written specifications were outside the contemplation of the contract; that neither party, at the time of contracting, intended that the foundations would be completed on the original dates; and that their later completion was therefore no breach of contract (R. 32–33). Accordingly, it dismissed the petition (R. 33).

ARGUMENT

1. The facts found by the court below, binding upon petitioner (cf. *United States* v. *Esnault-Pelterie,* 299 U. S. 201, 205–206), clearly established that both petitioner and the United States understood that the foundation work was not to be completed on the dates specified in the original invitation (R. 33). Based on this understanding, the real bargain between the parties was properly enforced and necessarily defeated petitioner's technical argument from the written provisions of the contract.[5] *Ackerlind* v. *United States,* 240 U. S. 531, 534; *E. W. Bliss Co.* v. *United States,*

[5] No question as to distinctions between impossibility and improbability of performance is presented by this case and authorities cited by petitioner which rest upon the distinction are inapposite (Pet. 7–12).

275 U. S. 509; *Poole Engineering & Machine Co.* v. *United States,* 58 C. Cls. 9, 19–20.

The court below had jurisdiction to grant, in effect, reformation of the written contract (*United States* v. *Milliken Imprinting Co.,* 202 U. S. 168, 173–174), and petitioner's conduct in failing to call the Government's error to its attention was such that reformation was properly granted. *Restatement of Contracts,* Sections 504, 505; Williston, *Contracts* (Rev. Ed.) Section 1548. Reformation may be had to "express the actual agreement of the parties, in case of mutual mistake, or mistake upon the part of one and fraud or inequitable conduct on the part of the other." *Columbian Nat. Life Ins. Co.* v. *Black,* 35 F. 2d 571, 573 (C. C. A. 10).

Petitioner knew that the foundations would not be ready on the dates specified in the original invitation and used its advantage in every aspect of the transaction. It ignored its actual knowledge for the purpose of maintaining the low bidder position. It utilized that knowledge in making the arrangements for sub-contracting work. It relied upon the written specifications in obtaining an extension of time. Certainly petitioner could not equitably utilize this knowledge to its advantage in all these ways and at the same time secure damages for breach of contract.

Completely disregarding these facts, petitioner here insists that the question is simply one of holding the United States bound by a written provision of the contract (Pet. 2, 7, 9). Thus, petitioner states that it had a "perfect legal right" to rely upon the written provision (Pet. 15) and that the failure of the Government to notify petitioner that the foundation work would not be complete on the dates set forth in the invitation prevented petitioner from refusing to enter the contract as it would "unquestionably" have done (Pet. 15). The basic point in the case lies in the findings below that petitioner had knowledge of the facts and that, by virtue of this knowledge, petitioner did not have a "perfect legal right" to remain silent and thereafter utilize the written provision to its own advantage. With equal strength, the findings as to petitioner's knowledge refute any contention that petitioner lost the opportunity of refusing to contract.[6] Petitioner inserted the contract price into its bid after learning the actual situation as to the completion of the

[6] The petition is itself inconsistent in connection with this question of reliance. Petitioner contends that there is no question of misrepresentation or warranty (Pet. 12–13), a contention which is contradicted by its subsequent assertion that it lost the opportunity of withdrawing from the contract by reason of the Government's failure to disclose to it that the foundations would not be complete on the dates originally specified (Pet. 15).

foundation. In the absence of a showing that, despite its knowledge, petitioner did not take this changed situation into account in making its bid (R. 21) and planned to rely on the contract as written, no finding of money damage could be sustained. This in itself would justify the dismissal of the claim. *United States* v. *Smith*, 94 U. S. 214, 218–219; *United States* v. *Wyckoff Pipe & Creosoting Company, Inc.*, 271 U. S. 263, 267.[7]

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[7] It is to be observed that another bar to petitioner's recovery exists, not fully disclosed, in the record. The court below found that petitioner was, by check dated September 16, 1939, paid the contract price, plus extras, "the final invoice having been submitted on or about September 1, 1939" (R. 26). The final voucher was received in evidence, and, while the court below did not make specific findings in respect thereof, that voucher shows on its face that petitioner failed to reserve the claim here involved. Failure to assert an alleged breach of contract by the Government at the time of final settlement is, in itself, sufficient to defeat the claim. *Poole Engineering & Machine Co.* v. *United States*, 57 C. Cls. 232, 234. While the record does not include the final voucher, it is assumed that its contents would not be denied by petitioner. Accordingly, even should certiorari be granted and the judgment below reversed, the case would have to be remanded to the Court of Claims for a specific finding in this respect, a finding which would result in dismissal of petitioner's claim. Cf. *United States* v. *Brooks-Callaway Co.*, 318 U. S. 120, 124–125.

CONCLUSION

The decision below turns on the particular facts of this case. No question of importance is presented and there is no conflict. It is, therefore, respectfully submitted that the petition for a writ of certiorari should be denied.

HAROLD JUDSON,
Acting Solicitor General.
JOHN F. SONNETT,
Acting Head, Claims Division.
DAVID L. KREEGER,
Special Assistant to the Attorney General.
PAUL A. SWEENEY,
SAMUEL D. SLADE,
Attorneys.

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